

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America, et al.

v.

Case No. 09-cv-283-PB  
Opinion No. 2012 DNH 021

City of Portsmouth, New Hampshire

MEMORANDUM AND ORDER

The United States has filed a motion to modify a consent decree that addresses the City of Portsmouth's failure to abide by the Clean Water Act and the New Hampshire Water Pollution and Waste Disposal Act. All of the parties to the consent decree support the proposed modification but the Conservation Law Foundation ("CLF") has intervened and filed an objection. In this Memorandum and Order, I explain why I overrule CLF's objection and approve the proposed modification to the consent decree.

I. BACKGROUND

A. The Complaints

On August 8, 2009, the United States filed a complaint alleging that the City of Portsmouth ("Portsmouth") violated several sections of the Clean Water Act ("CWA"), 33 U.S.C. §



1251, et seq. Doc. No. 1. On September 9, 2009, New Hampshire intervened in the action and filed a complaint alleging that Portsmouth violated the New Hampshire Water Pollution and Waste Disposal Act, N.H. Rev. Stat. Ann. § 485-A:13 (2013). Doc. No.

4. The complaints allege that the City violated both permit effluent limitations for discharges from the City's Pierce Island wastewater treatment plant and permit conditions applicable to discharges from overflow points in the City's combined wastewater collection system.

**B. The Consent Decree**

The United States filed a proposed consent decree with its complaint. The consent decree requires Portsmouth to take several steps to bring its wastewater treatment practices into compliance with the Clean Water Act. For example, the decree requires Portsmouth to implement a compliance plan, develop and implement a wastewater master plan, perform combined sewer overflow facility upgrades, comply with interim emissions/effluent limits until the secondary treatment facilities achieve full operation, submit and comply with a post construction monitoring plan, and comply with reporting



requirements. Portsmouth has already taken some of these steps. It is working toward accomplishing the others.

Two requirements are relevant to the proposed modification. Those requirements are: (1) that Portsmouth must undertake a series of projects, to be completed before October 2013, to upgrade sewer overflow facilities and reduce the frequency and volume of combined sewer overflow; and (2) that Portsmouth must submit a construction schedule for secondary wastewater treatment facilities by June 2010. Doc. No. 8.

**C. Proposed Consent Decree Modification**

On July 2, 2012, the United States lodged a proposed consent decree modification with the court. A notice was published in the Federal Register on July 18, 2012, announcing the consent decree modification. Coastal Conservation Association of New Hampshire and CLF submitted comments during the ensuing public comment period.

The proposed modification contains two main provisions. First, it extends the schedule for completion of the combined sewer overflow upgrades from October 2013 to October 2014. The parties agreed to this modification because Portsmouth encountered unexpected geological conditions that prevented the



City from meeting the original construction schedule and because local budget procedures prevented the City from allocating adequate financial resources to commence secondary pilot testing. Second, it establishes a construction schedule for the secondary treatment facilities, as required by the original decree. The second provision is not actually a modification of the consent decree, but is instead a required addition to the original decree. Portsmouth submitted a proposed schedule in June 2010, and, after further submissions and negotiations, the EPA, New Hampshire Department of Environmental Services ("NHDES"), and Portsmouth agreed on a construction schedule that provides for construction of secondary treatment facilities to be completed and compliance with secondary treatment limits to be achieved by May 2017.

**D. CLF Objection**

CLF filed an objection to the United States' motion to enter the consent decree modification. CLF does not object to either of the two main provisions of the consent decree modification. Instead, it argues that Portsmouth's past failures in complying with the Clean Water Act require the court to more closely monitor the EPA's management of the consent decree. In



particular, it proposes that I require the parties to file quarterly reports and attend status conferences and compliance hearings.

## **II. STANDARD OF REVIEW**

When evaluating a proposed consent decree, the court determines whether the proposed decree is "fair, reasonable, and faithful to the objectives of the governing statute." United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990). The court does not consider whether the settlement is one the court would have reached or whether the court thinks the settlement is ideal. Id. The First Circuit has consistently recognized a strong and clear policy in favor of encouraging settlements, especially in complicated regulatory settings. See United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000); Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 59 (1st Cir. 1993); Durrett v. Hous. Auth. of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990); Cannons Eng'g, 899 F.2d at 84. That policy is even stronger where the consent decree has been advanced by a "government actor 'committed to the protection of the public



interest' and specially trained and oriented in the field." Comunidades Unidas, 204 F.3d at 280 (quoting Cannons Eng'g, 899 F.2d at 84). In reviewing a settlement involving a government agency, "the district court must exercise some deference to the agency's determination that settlement is appropriate." Conservation Law Found., 989 F.2d at 58.

Different rules apply when a party seeks to modify an existing consent decree. Federal Rule of Civil Procedure 60(b)(5) allows a district court to modify a consent decree when it is no longer equitable that the judgment should have prospective application.

In United States v. Swift & Co., the Supreme Court held that a party seeking to modify a consent decree must make a "clear showing of grievous wrong." 286 U.S. 106, 119 (1932). Almost sixty years later, in Rufo v. Inmates of the Suffolk Cnty. Jail, the Supreme Court revisited the issue in the context of institutional reform litigation and recognized the need for "a less stringent, more flexible standard" than the standard articulated in Swift. 502 U.S. 367, 380 (1992). In Rufo, the Court observed that a consent decree modification may be warranted "when changed factual conditions make compliance with



the decree substantially more onerous . . . when a decree proves to be unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification would be detrimental to the public interest." Id. at 384 (citations omitted). Rufo instructed district courts to "exercise flexibility in considering requests for modification of ... institutional reform consent decree[s]," id. at 383, because such decrees impact the public's right to "the sound and efficient operation of its institutions." Id. at 381.

Rufo established a two-prong test that a party must meet to modify a consent decree. First, the party seeking the modification must establish that a significant change in facts or law warrants revision of the decree. Id. at 383. If the moving party meets the first prong, the court considers whether the proposed modification is suitably tailored to the changed circumstances. Id. If both prongs are satisfied, the district court may approve the consent decree modification.

The First Circuit has not confined the Rufo holding to institutional reform litigation and has avoided strictly classifying cases to determine the applicable standard. Alexis Lichine & Cie v. Sacha A. Lichine Estate Selections, Ltd., 45



F.3d 582, 586 (1995). Instead, the First Circuit has held that the two standards should be viewed not as "a limited dualism but as polar opposites of a continuum in which we must locate the instant case." Id. On one end of the continuum are consent decrees protecting "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change" (as illustrated by Swift). Id. On the other end of the continuum are decrees involving "the supervision of changing conduct or conditions and thus provisional and tentative" (as illustrated by Rufo). Id. (quoting Rufo, 502 U.S. at 379).

### III. ANALYSIS

There are two main provisions of the proposed consent decree modification: (1) the provision extending the schedule for completion of the combined sewer overflow ("CSO") upgrades from October 2013 to October 2014; and (2) the provision establishing a construction schedule for the secondary wastewater treatment facilities. The first provision modifies the existing consent decree. The second provision does not change any provision in the existing decree. Instead, it merely fulfills a commitment that the parties made in the original



decree to submit a construction schedule for the secondary treatment facilities. In this sense, the second provision is more like a new consent decree than a modification to an existing decree. Accordingly, I analyze the first provision using the standard for approving a consent decree modification and the second using the standard for initially approving a consent decree.

**A. First Provision: Modifying the Completion Deadline for Sewer Overflow Upgrades**

Rufo instructed district courts to exercise flexibility when considering a request to modify an institutional reform decree because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." 502 U.S. at 381 (quoting Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989)). A similarly flexible standard is appropriate in this case because public entities and the environment are involved. Accordingly, I apply the Rufo standard in evaluating the first of the two proposed modifications.

The United States seeks to modify the consent decree by extending the schedule for sewer upgrades by one year arguing that significant changes in factual circumstances warrant



revision of the decree. The United States offers two factual changes to justify the one-year extension: (1) Portsmouth encountered unexpected geological conditions that impaired the City's ability to meet the original construction schedule; and (2) Portsmouth's local budget procedures required the City to reallocate resources from the sewer upgrades to maximize the earliest environmental improvement.

The unexpected geological condition was that Portsmouth was required to remove a larger volume of rock than initially anticipated. Rock removal proceeded slowly because the projects are located in densely populated neighborhoods with older homes; there are high pressure gas vaults and mains in the street; and the contractors had to remove the rocks by mechanical means instead of blasting. The EPA reviewed the information Portsmouth provided and agreed that these geological conditions impaired Portsmouth's ability to meet the initial schedule.

Local budget procedures also required Portsmouth to redirect funds from the sewer upgrade project to the testing of secondary treatment facilities. The EPA agreed with the City that redirecting funds from the sewer upgrade project to the testing of secondary facilities would maximize the earliest



environmental improvement and merited a change in the schedule.

These changed factual circumstances satisfy the first prong of the Rufo test. As the Court explained in Rufo, modification is "appropriate when a decree proves to be unworkable because of unforeseen obstacles." 502 U.S. at 384. Here, the volume of rock is an unforeseen obstacle. CLF has not suggested that any of the parties anticipated the volume of rock later found at the sites. Modification is also appropriate when enforcement of the decree without modification would be detrimental to the public interest. Id. Here, Portsmouth and the EPA agreed that, given budget constraints, it was in the environmental interest to prioritize funding secondary treatment facility testing before the sewer upgrade project. CLF has offered no reason to question this judgment.

After finding that a change of facts occurred which merit revision of the decree, I next consider whether the proposed modification is suitably tailored to those changed circumstances. Again, CLF offers no reason to question the suitability of the proposed modification. "[O]nce a court has determined that a modification is warranted . . . principles of federalism and simple common sense require the court to give



significant weight to the views of the local government officials who must implement any modification." Id. at 393 n.14. The EPA and Portsmouth determined that the one-year extension of the CSO mitigation schedule is suitably tailored to the changed circumstances. The parties' view merits "significant weight" at the second prong of the Rufo analysis. See id. I find that the proposed modification is suitably tailored to the changed circumstances.

Accordingly, I approve the modification under the Rufo standard.

**B. Second Provision: Establishing a Construction Schedule for Secondary Wastewater Treatment Facilities**

The second provision of the proposed consent decree modification establishes a construction schedule for the secondary wastewater treatment facilities. Because this provision creates additional requirements beyond those in the existing consent decree, and is therefore not actually a modification, I analyze it using the standard for approval of a consent decree. When evaluating a consent decree, the court must determine whether the proposed decree is "fair, reasonable, and faithful to the objectives of the governing statute."

Cannons Eng'g, 899 F.2d at 84.



The fairness of a proposed consent decree includes both procedural and substantive fairness. See id. at 86. To measure procedural fairness, I "look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." See id. Here, the provision establishing a construction schedule is procedurally fair because the parties negotiated it at arm's length, with adequate information and reports, and were represented by counsel. See id. A consent decree is substantively fair if it is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each P[otentially] R[esponsible] P[arty] has done." See id. at 87. The EPA determination of substantive fairness should be upheld "so long as the agency supplies a plausible explanation for it." Id. Because concepts of corrective justice and accountability are not easily quantified in environmental cases, I defer to the EPA's expertise when weighing substantive fairness. See City of Bangor v. Citizens Commc'n Co., 532 F.3d 70, 97 (1st Cir. 2008); Cannons Eng'g, 899 F.2d at 88.



The construction schedule is also reasonable. Courts have found consent decrees to be reasonable when they provide for short- and long-term equipment improvements, detailed compliance schedules, fulfillment of contractual obligations, and reporting requirements. See Comunidades Unidas, 204 F.3d at 281. The court does not examine the reasonableness of the proposed consent decrees for "mathematical precision," but instead defers to the EPA's judgment on whether the consent decree is reasonable. United States v. Davis, 261 F.3d 1, 26 (1st Cir. 2001); Cannons Eng'g, 899 F.2d at 90. Here, the relief is tailored to redressing the injuries alleged in the complaint. See Comunidades Unidas, 204 F.3d at 281. The construction schedule for the secondary treatment facilities is reasonable.

Finally, the construction schedule is also faithful to the objectives of the Clean Water Act. CLF simply points to the past delays by Portsmouth in complying with its obligations under the Clean Water Act and asserts that Portsmouth and the EPA have failed to act with the "urgency warranted by the circumstances." Doc. No. 23-1. The construction schedule seeks to bring Portsmouth into compliance with the Act. The court defers to the judgment of the EPA that the consent decree is



consistent with the objectives of the Clean Water Act. Comunidades Unidas, 204 F.3d at 280 (finding a strong presumption in favor of entering consent decrees advanced by government agencies that are "committed to the protection of the public interest and specially trained and oriented in the field") (internal quotations omitted). CLF has not suggested that the construction schedule is contrary to the objectives of the Act and has not provided any reason to question the EPA's judgment on this matter.

Accordingly, I conclude that the proposed construction schedule is "fair, reasonable, and faithful to the objectives of the governing statute." See Cannons Eng'g Corp., 899 F.2d at 84.

**C. Additional Oversight Not Required at This Time**

CLF proposes that I require the parties to file quarterly reports and attend status conferences and compliance hearings. I conclude that such oversight is not required at this time. The parties have not requested additional oversight and CLF does not provide sufficient justification to require additional oversight. On its own, Portsmouth's delay in complying with the Clean Water Act before the consent decree was approved does not



justify additional oversight. There is no reason to believe that Portsmouth is unreasonably delaying compliance with the current consent decree. I deny CLF's motion without prejudice to its right to petition for greater oversight in the future if the parties seek to modify other deadlines or otherwise cause undue delay.

#### IV. CONCLUSION

For the reasons set forth in this order, I approve the consent decree modification offered by the parties. Doc. No. 10-1.

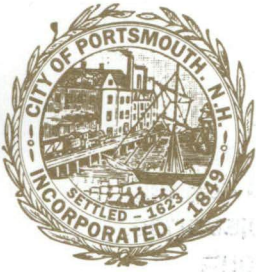
SO ORDERED.

/s/Paul Barbadoro  
Paul Barbadoro  
United States District Judge

February 15, 2013

cc: Peter M. Flynn  
Mary E. Maloney  
E. Tupper Kinder  
Thomas F. Irwin





# PUBLIC WORKS DEPARTMENT

CITY OF PORTSMOUTH

680 Peverly Hill Road

Portsmouth N.H. 03801

(603) 427-1530 FAX (603) 427-1539

February 19, 2013

**VIA E-MAIL and MAIL**

Joy Hilton

Environmental Protection Agency, Region 1

5 Post Office Square

Mail Code: OES

Boston, MA 02109-3912

**RE: City of Portsmouth Consent Decree, Docket #: NO. 09-cv-283-PB  
Cass Street (Islington 2) Sewer Separation Project**

Dear Joy,

Enclosed please find the most recent communication from Keith Pratt and Phil MacDonald of Underwood Engineers received by the City on February 14, 2013 regarding contract time extensions for the completion of the sewer separation work for Cass area (Islington 2) Sewer Separation Project. As you know, the City is required under its Consent Decree to complete the sewer separation work for this area by June 1, 2013. Albanese D&S Inc is performing the construction work and Underwood Engineers ("UE") is providing project oversight.

As set forth in the enclosed letter, UE continues to recommend that the City seek a sixty (60) day extension to complete the sewer separation work due to unforeseen conditions. The City would like to discuss this situation with you as soon as possible. Contractually the City needs to respond to the contractor's Change Order No. 2 which seeks a 35 day extension.

As required by the Consent Decree:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my

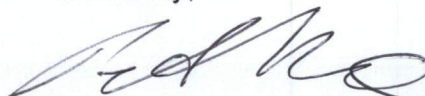


Page Two  
February 19, 2013

**RE: City of Portsmouth Consent Decree, Docket #: NO. 09-cv-283-PB  
Cass Street (Islington 2) Sewer Separation Project**

knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Sincerely,



Peter Rice, P.E.  
Deputy Director of Public Works

enclosure

cc: Dave Allen, Deputy City Manager  
Suzanne Woodland, Assistant City Attorney  
Terry Desmarais, Jr., City Engineer Water and Sewer Divisions  
Rick Dolce, Engineering Project Manager  
Keith Pratt, Underwood Engineers  
E. Tupper Kinder, Esq.  
Mark Pollins, EPA  
Chief, Environmental Enforcement Section, US DOJ  
Tracy L. Wood, P.E., NHDES  
Allen Brooks, Esq., NHDOJ



1565.00

February 13, 2013

Terry L. Desmarais, Jr., P.E.  
City Engineer Water and Sewer Divisions  
Public Works Department  
680 Peverly Hill Road  
Portsmouth, New Hampshire 03801

**Re:    *Action Required - Time Extension***  
         ***Cass Area Sewer Improvements***  
         Portsmouth, New Hampshire

Dear Mr. Desmarais,

The Contractor for the referenced project has requested several time extensions. The need and purpose for the additional time was summarized by Underwood in a letter to the City dated November 13, 2012. Since granting the extensions would exceed the Consent Decree deadlines, a request to EPA for a 60 day time extension is recommended.

On November 19, 2012, AD&S requested a 30 day extension. On December 13, 2012, the Contractor requested an additional equitable time extension for work needed at the Malt House Exchange. Based on the Contractor's requests, we recommend that the contract time for the referenced project be extended by 35 days. To that end, draft Change Order No. 2 which extends the contract time by 35 days is attached for review by the City.

**Action Required:**

At this time we suggest that the EPA be provided the draft CO #2 and be afforded an opportunity to comment. Pending the City's review of any comments from EPA, we recommend that the CO #2 be executed as soon as possible (within 30 days).

As you are aware issues relating to the disposal of contaminated soils are ongoing and we anticipate that additional time extensions will be needed to address disposal of soils recently excavated from the Chevrolet Road area. Also, the Contractor continues to claim that the soils from the Albany Street area are impacting their operations at the staging area on Brewery. We therefore maintain that a 60 day extension for EPA CD deadlines is needed (35 days for CO#2 and 25 days impending).



*Terry L. Desmarais, Jr., P.E.*

*February 13, 2013*

*Page 2 of 2*

Please advise us at your earliest convenience, so that we may administer the contract as expected.

Very truly yours,

UNDERWOOD ENGINEERS



Philip D. MacDonald, P.E.  
Project Manager

PDM/KAP/pdm

Encl.

cc: Peter H. Rice, P.E., Deputy Public Works Director (w. Encl.)  
Suzanne Woodland, City of Portsmouth Legal Department (w. Encl.)



Keith A. Pratt, P.E.  
President





B-9.1 (SRF)  
CHANGE ORDER

No. 2

PROJECT: Cass Street Area Sewer Improvements  
OWNER: City of Portsmouth  
(Name & Address) 1 Junkins Ave  
Portsmouth, NH 03801

DATE OF ISSUANCE: **DRAFT**  
OWNER'S P.O. NUMBER: **13000057**

OWNER'S PROJECT #:  
ENGINEER Underwood Engineers, Inc.  
ENGINEER'S PROJECT #: 1565.36

CONTRACTOR: Albanese D&S, Inc.

You are directed to make the following changes in the Contract Documents:

**Description:** The contract time is extended 35 calendar days for additional sewer construction work related to contaminated soil conditions, subsurface rail road ties and modifications to the project design which increased the scope of work.

**Purpose of Change Order:** To authorize extension of contract time related to additional work necessary for addressing unforeseen conditions encountered during construction (see Attachment "A").

**Attachments:** Attachment "A" Change Order Summary (2 pages)  
Attachment "B" Back Up Information (3 pages)

CHANGE IN CONTRACT PRICE		CHANGE IN CONTRACT TIME		
Original Contract Price		<u>Original Contract Time:</u>		
<b>\$2,781,342.00</b>			<b>Days</b>	<b>Date</b>
SAG Eligible	\$2,072,340.22	Sewer Substantial Completion:	210	May 26, 2013
SAG Non-eligible	\$709,001.78	Project Substantial Completion:	270	July 25, 2013
		Final Completion:	330	September 23, 2013
Previous Change Orders		<u>Net change from previous Change Orders</u>		
<b>\$141,868.12</b>		Sewer Substantial Completion:	0	Days
SAG Eligible	\$138,403.12	Project Substantial Completion:	10	Days
SAG Non-eligible	\$3,465.00	Final Completion:	10	Days
Contract Price prior to this Change Order		<u>Contract Time prior to this Change Order:</u>		
<b>\$2,923,210.12</b>			<b>Days</b>	<b>Date</b>
SAG Eligible	\$2,210,743.34	Sewer Substantial Completion:	210	May 26, 2013
SAG Non-eligible	\$712,466.78	Project Substantial Completion:	280	August 4, 2013
		Final Completion:	340	October 3, 2013
Net Change Increase (Decrease) of this Change Order		<u>Net Change of this Change Order</u>		
<b>\$0.00</b>		Sewer Substantial Completion:	35	Days
SAG Eligible	\$0.00	Project Substantial Completion:	35	Days
SAG Non-eligible	\$0.00	Final Completion:	35	Days
Contract Price with all approved Change Orders		<u>Contract Time with all approved change orders</u>		
<b>\$2,923,210.12</b>			<b>Days</b>	<b>Date</b>
CWSRF #CS-330106-14	\$2,210,743.34	Sewer Substantial Completion:	245	June 30, 2013
SAG Non-eligible	\$712,466.78	Project Substantial Completion:	315	September 8, 2013
		Final Completion:	375	November 7, 2013

This document will become a supplement to the CONTRACT and all provisions will apply hereto. The attached Contractor's Revised Project Schedule reflects increases or decreases in Contract Time as authorized by this Change Order.

Stipulated price and time adjustment includes all costs and time associated with the above described change. Contractor waives all rights for additional time extension for said change. Contractor and Owner agree that the price(s) and time adjustment(s) stated above are equitable and acceptable to both parties.

Recommended By:	Accepted By:	Approved By:
_____	_____	_____
Benjamin T. Dreyer, P.E. (Underwood Engineers)	Paul R.Scenna, Vice President (Albanese D&S, Inc.)	Tim Carney, P.E. (NHDES)
Approved By:	Approved By:	Approved By:
_____	_____	_____
Peter H. Rice, P.E. Deputy Director Public Works (City of Portsmouth)	Judie Belanger, Finance Director (City of Portsmouth)	John Bohenko, City Manager (City of Portsmouth)



***Cass Street Area Sewer Improvements  
SRF Project No. CS-330106-14  
City of Portsmouth, NH***

**Change Order Summary  
Change Order No. 2  
DRAFT**

**Part 1: Purpose and Description of Change**

This project is part of the City's ongoing sewer separation effort to meet an EPA Administrative Order enacted under Consent Decree. The Consent Decree deadline for sewer separation on this project is June 1, 2013. The following construction delays which impact scheduled completion of sewer separation work have been encountered due to unforeseen site conditions:

**Underground Storage Tank (UST) and Contaminated Soil - Brewery Lane (13 Days)**

On September 18, 2012 an underground storage tank was encountered on Brewery Lane during sewer and drain installation. Soils were removed, stockpiled and covered in plastic at the Contractor's staging area. Soil testing indicated the presence of petroleum contaminants. Change Order No. 1 authorized special provisions to facilitate soil disposal.

**Rails, Ties and Contaminated Soils - Albany Street (13 Days)**

On September 24, 2012 steel rails and treated wooden ties were encountered beneath the pavement on Albany Street. Materials within the limits of the trench were removed as work proceeded towards Islington Street. Typical installation operations were interrupted intermittently to remove portions of the rail road elements. Change Order No. 1 authorized provisions to remove all the steel rails and wooden ties in a single operation to allow pipe installation to continue in the normal sequence.

On October 15, 2012, petroleum contaminated soils were encountered in the vicinity of 68 Albany Street and work stopped. Similar to the soils encountered on Brewery Lane, plans for handling and disposal of contaminated soils caused delays. A final determination for removing and disposing of the soils is still pending.

**Chevrolet Avenue and Albany Street Urban Fill Soil Stockpiles (4 Days)**

As of December 17<sup>th</sup> 2012, other surplus soil requiring special attention for disposal has been generated. Approximately 500 cubic yards of material reportedly originated in the Chevrolet Avenue work area during drain system installation. A similar pile of approximately 500 cubic yards has been generated from drain and sewer installation work on Albany Street. Soil test results from both piles reflect background levels of contaminants typical of urban fill material. A resolution to the condition is pending a meeting between the City and NHDES which is currently scheduled for February 21, 2013.

**Malthouse Exchange Sewer Service Modification (5 Days)**

A sewer service connection to the existing drain system was discovered in the Malthouse Exchange parking area. The sewer design on Chevrolet Avenue has been modified to extend an 8" PVC sewer line to pick up this sewer service. The Contractor has requested a time extension for completion of this work.



Attachment "A"

**Part 2: Changes in Contract Time**

A total of 30 calendar days are added to the Contract Times. The Contract Completion Deadlines are modified as follows:

<u>Completion Date</u>	<u>Original Contract</u>	<u>CO No.1</u>	<u>CO No.2</u>	<u>Total Time</u>
Sewer Substantial Completion:	210 Days	0 Days	+ 35 Days	240 Days
Project Substantial Completion:	280 Days	+ 10 Days	+ 35 Days	280 Days
Project Final Completion:	340 Days	+ 10 Days	+ 35 Days	370 Days

**Part 3: Changes in Quantities and Cost**

No Changes

**Part 4: Technical Modifications**

No Changes

**Part 5: Drawing Modifications**

No Changes





ATTACHMENT "B"

Albanese D&S, Inc. 1 of 3

66 Silva Lane  
Dracut, MA 01826

Phone: 978-937-0909

Fax: 978-937-9292

December 13, 2012

Benjamin T. Dreyer, P.E.  
Underwood Engineers  
25 Vaughan Mall  
Portsmouth, NH 03801

**RE: Extension of Time Request per ESI No. 8**  
City of Portsmouth, NH – Cass Street Area Sewer Improvements

Dear Mr. Dreyer:

Due to the recently received Engineer's Supplemental Information (ESI) #8, AD&S request an equitable adjustment in contract time as compensation for associated additional work resulting from these differing and un-anticipated subsurface conditions.

Respectfully Yours,  
Albanese D&S, Inc.

Thomas Molinari  
Project Manager

Cc: Andrea Ciano, AD&S  
Giovanni Albanese, AD&S  
Paul R. Scenna, AD&S

SUGGEST 5 DAYS





Albanese D&S, Inc.

ATTACHMENT "B"  
2 of 3

66 Silva Lane  
Dracut, MA 01826

Phone: 978-937-0909  
Fax: 978-937-9292

November 19, 2012

Benjamin T. Dreyer, P.E.  
Underwood Engineers  
25 Vaughan Mall  
Portsmouth, NH 03801

**RE: Request Extension of Time for Change Order No. 1**  
City of Portsmouth, NH – Cass Street Area Sewer Improvements

Dear Mr. Dreyer:

As recently discussed on November 15, 2012, Albanese D&S, Inc. (AD&S) respectfully request an extension of "Sewer and Project Substantial Completion" time equal to thirty (30) days as it relates to Change Order No. 1 for the associated additional work resulting from these differing and un-anticipated subsurface conditions.

Respectfully Yours,  
Albanese D&S, Inc.

Paul R. Scenna  
Vice-President

Cc: Andrea Ciano, AD&S  
Giovanni Albanese, AD&S  
Thomas Molinari, AD&S





# Albanese D&S, Inc.

ATTACHMENT "B"

3 of 3

66 Silva Lane  
Dracut, MA 01826

Phone: 978-937-0909  
Fax: 978-937-9292

November 9, 2012

Benjamin T. Dreyer, P.E.  
Underwood Engineers  
25 Vaughan Mall  
Portsmouth, NH 03801

**RE: Change Order No. 1**  
City of Portsmouth, NH – Cass Street Area Sewer Improvements

Dear Mr. Dreyer:

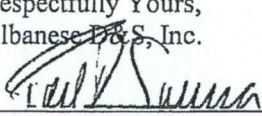
Per Underwood's request, Albanese D&S, Inc. (AD&S) has provided the attached signed Change Order No.1 with the following conditions.

As previously discussed, AD&S reserves their rights as they are not in agreement with the Sewer Substantial Completion time not being extended as a results of this change.

AD&S also reserves their rights for EWO 3E regarding a remobilization effort and other downtime associated with encountering unknown contaminated soils during the drain installation.

Albanese D&S, Inc. requests an equitable adjustment in contract price and contract time as compensation for associated additional work resulting from these differing and un-anticipated subsurface conditions.

Respectfully Yours,  
Albanese D&S, Inc.

  
Paul R. Scenna  
Vice-President

Cc: Andrea Ciano, AD&S  
Thomas Molinari, AD&S



SEE AD&S 11/19/12  
REQUEST FOR 30 DAY  
EXTENSION



SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>		A. Signature X <i>Peter Rice</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to:  Peter Rice, P.E. Deputy Director of Public Works City of Portsmouth 680 Peverly Hill Road Portsmouth, NH 03801		B. Received by (Printed Name)	C. Date of Delivery
		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
2. Article Number: (Transfer from sel)		7011 1150 0002 0901 7232	

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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Restricted (Endorsement)		
Total Post		
Sent To	Peter Rice, P.E. Deputy Director of Public Works City of Portsmouth 680 Peverly Hill Road	

11 1150 0002 0901 7232





**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**Region 1**  
**5 Post Office Square, Suite 100**  
**Boston, MA 02109-3912**

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

February 21, 2013

Peter Rice, P. E.  
Deputy Director of Public Works  
City of Portsmouth  
680 Peverly Hill Road  
Portsmouth, NH 03801

Re: City of Portsmouth, New Hampshire  
NPDES Permit No. NH0100234  
Consent Decree Docket No. 09-cv-283-PB  
Islington # 2 (Cass Street) Sewer Separation Project

Dear Mr. Rice:

Thank you for your February 19, 2013 letter to EPA providing an assessment of how the unforeseen conditions will impact the Cass Street sewer separation project construction schedule. We understand that the sewer separation project will be completed by July 31, 2013. As you are aware, the City of Portsmouth must use its best efforts to minimize any delay.

Sincerely,

A handwritten signature in black ink, appearing to read "Joy Hilton", is written over the typed name.

Joy Hilton  
Environmental Engineer  
Water Technical Unit

cc: Tracy Wood, NHDES



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I

IN THE MATTER OF

THE CITY OF PORTSMOUTH, NEW HAMPSHIRE  
PUBLIC WORKS DEPARTMENT  
NPDES No. NH0100234

Proceedings under Section 309(a)(3)  
ORDER FOR COMPLIANCE  
of the Clean Water Act, as amended,  
33 U.S.C. §1319(a)(3)

DOCKET No. 02-15

FINDINGS OF VIOLATION

AND

ORDER FOR COMPLIANCE

STATUTORY AUTHORITY

The following FINDINGS are made and ORDER issued pursuant to Section 309(a)(3) of the Clean Water Act, as amended (the "Act"), 33 U.S.C. §1319(a)(3), which grants to the Administrator of the U.S. Environmental Protection Agency ("EPA") the authority to issue orders requiring persons to comply with Sections 301, 302, 306, 307, 308, 318 and 405 of the Act and any permit condition or limitation implementing any of such sections in a National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 of the Act, 33 U.S.C. §1342. This authority has been delegated to EPA's Regional Administrators and further delegated to the Director of EPA, Region I's Office of Environmental Stewardship (the "Director").

The Order herein is based on findings of violations of Section 301 of the Act, 33 U.S.C. §1311, and the conditions of NPDES Permit No. NH0100234. Pursuant to Section 309(a)(5)(A) of the Act, 33 U.S.C. § 1319(a)(5)(A), the Order provides a schedule for compliance which the Director has determined to be reasonable.



## FINDINGS

The Director makes the following findings of fact:

1. The City of Portsmouth (the "Permittee"), a municipal corporation established under the laws of the State of New Hampshire, is a municipality under Section 502(4) of the Act.
2. The Permittee is a person under Section 502(5) of the Act, 33 U.S.C §1362(5). The Permittee is the owner and operator of a wastewater treatment facility (the "Facility") and three combined sewer overflow ("CSO") discharge points from which it discharges pollutants, as defined in Sections 502(6) and (12) of the Act, 33 U.S.C. §§1362(6) and (12), from point sources, as defined in Section 502(14) of the Act, 33 U.S.C. §1362(14), to the South Mill Pond and the Piscataqua River. The South Mill Pond and the Piscataqua River are Class B waterways. These receiving waters named above are navigable waters under Section 502(7) of the Act, 33 U.S.C. §1362(7). The Facility is a 4.5 million gallon per day ("MGD") wastewater treatment plant which treats and discharges an average flow of approximately 3.5 MGD of wastewater to the Piscataqua River during dry weather.
3. On January 18, 1985 the Permittee was reissued NPDES Permit No. NH0100234 (the "Permit") by the Director of the Water Management Division of EPA, Region I, under the authority given to the Administrator of EPA by Section 402 of the Clean Water Act, 33 U.S.C. §1342. This authority has been delegated by the Administrator of EPA to the



Regional Administrator of EPA, Region I, who had in turn delegated this authority to the Director of the Water Management Division. The Permit became effective on January 18, 1985.

4. The Permit authorizes the Permittee to discharge pollutants from a point source at the Facility and three CSO discharge points to the South Mill Pond and the Piscataqua River subject to the effluent limitations, monitoring requirements, and other conditions specified in the Permit.
5. Section 301(a) of the Act, 33 U.S.C. §1311(a), makes unlawful the discharge of pollutants to waters of the United States except in compliance with, among other things, the terms and conditions of an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.
6. Part I.B.1. of the Permit requires that CSO discharges receive treatment at a level necessary to achieve water quality standards and that CSOs not cause violations of State Water Quality Standards.
7. Part II(m) of the Permit prohibits bypass of the wastewater treatment plant unless the Permittee shows, among other things, that the bypass was unavoidable to prevent loss of life, personal injury and severe property damage, and that there was no feasible alternative to the bypass.



8. In January 1991 the Permittee's consultant (then Whitman & Howard, Inc.) completed a Combined Sewer Overflow Abatement Program ("1991 Plan") which was subsequently submitted to EPA and New Hampshire Department of Environmental Services (NH DES). The 1991 Plan described the monitoring, modeling, impact assessment, and alternative analysis of the combined sewer system.
9. Chapter 6 of the 1991 Plan reports the results of the 1990 CSO quality monitoring program for conventional parameters (see Table 6-2 on page 6-3 of the CSO Facilities Plan). All of the Total coliform bacteria concentrations measured in the CSO discharges exceeded the then effective water quality standards bacteria criterion, 240 colonies/100 ml for State of New Hampshire Class B receiving waters. Wet weather monitoring of CSO impacted receiving waters showed that these receiving waters violated the State's then effective water quality standards bacteria criterion (see Tables 6-3 through 6-15 on pages 6-7 through 6-25 of the CSO Facilities Plan). The Permittee's CSO discharges therefore contributed to violations of the State's water quality standards, thereby violating Part I.D.1 and I.D.2. of the NPDES Permit.
10. The Draft CSO Long Term Control Plan ("Draft LTCP") submitted by the City's consultant (Underwood Engineers, Inc.) on February 8, 2002 summarized Facility wastewater flows and overflows from the two permitted CSO structures for the period July 1995 through April 1998. These two permitted overflows, 010A and 010B, are



identified as continuing to discharge without treatment in violation of the State's water quality standards, thereby violating Part I.D.1 and I.D.2. of the NPDES Permit. The Draft LTCP also identified a third combined sewer overflow point at the Deer Street Tide Chamber adjacent to the Deer Street pumping station. This overflow point discharges untreated CSOs to the Piscataqua River in violation of the State's water quality standards.

### **ORDER**

Accordingly, pursuant to Section 309(a)(3) of the Clean Water Act, it is hereby ordered that the Permittee shall:

1. By **August 1, 2002** submit a final Long Term Control Plan ("LTCP") for CSOs outlining the steps and schedule by which the City will come into compliance with its permit and the New Hampshire water quality standards. Then LTCP shall conform to the EPA *Combined Sewer Overflow Policy*, 1994, and the EPA *Combined Sewer Overflows-Guidance for Financial Capability Assessment and Schedule Development*, 1997.
2. By **August 1, 2002** submit an update of the *Portsmouth Nine Minimum Controls for Combined Sewer Overflows*, January 14, 1997. The update shall identify a control as completed or provide a schedule for those controls not yet complete. For those controls described as ongoing, provide the implementation strategy and any written operating guidance or manuals as well a description of the record keeping requirements.



3. By **February 28, 2003**, complete the Preliminary Design Report ("Report") for the combined sewer area. The Report will identify and map each of the projects to be conducted and contain a schedule for final design and construction for each project.
4. By **March 3, 2003**, advertise bids for the construction of the Area #1 Project in the vicinity of Outfalls 010A and 010B.

#### NOTIFICATION PROCEDURES

1. Where this Order requires a specific action to be performed within a certain time frame, the Permittee shall submit a written notice of compliance or noncompliance with each deadline. Notification must be mailed within fourteen (14) days after each required deadline. The timely submission of a required report shall satisfy the requirement that a notice of compliance be submitted.
2. If noncompliance is reported, notification should include the following information:
  - a. A description of the noncompliance;
  - b. A description of any actions taken or proposed by the Permittee to comply with the elapsed schedule requirements;
  - c. A description of any factors which tend to explain or mitigate the noncompliance;
  - d. An approximate date by which the Permittee will perform the required action.
3. After a notification of noncompliance has been filed, compliance with the past requirement shall be reported by submitting any required documents or providing EPA with a written



report indicating that the required action has been achieved.

4. Submissions required by this Order shall be in writing and should be mailed to the following addresses:

Samuel Silverman, Acting Director  
Office of Environmental Stewardship  
U.S. Environmental Protection Agency  
Post Office Box 8127  
Boston, MA 02114-2023  
Attn: Eric Hall, SEW

G. Dana Bisbee, Assistant Commissioner  
New Hampshire Department of Environmental Services  
Wastewater Engineering Bureau  
Permits and Compliance  
6 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095  
Attn: George Berlandi

#### GENERAL PROVISIONS

1. The Permittee may, if it desires, assert a business confidentiality claim covering part or all of the information requested, in the manner described by 40 C.F.R. § 2.203(b).  
  
Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, the information may be made available to the public by EPA without further notice to the Permittee. The Permittee should read the above-cited regulations carefully before asserting a business confidentiality claim since certain categories of information are not properly the subject of such a claim.



For example, the Clean Water Act provides that "effluent data" shall in all cases be made available to the public. See Section 308(b) of the Act, 33 U.S.C. § 1318(b).

2. This Order does not constitute a waiver or a modification of the terms and conditions of the Permit. The Permit remains in full force and effect. EPA reserves the right to seek any and all remedies available under Section 309 of the Act, 33 U.S.C. § 1319, as amended, for any violation cited in this Order and Section 308 information request.
3. This Order shall become effective upon receipt by the Permittee.

7-11-02

Date

Sam Silverman

Samuel Silverman, Acting Director  
Office of Environmental Stewardship  
Environmental Protection Agency, Region I





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

ONE CONGRESS STREET

SUITE 1100, SEW

BOSTON, MASSACHUSETTS 02114-2023

CERTIFIED MAIL RETURN RECEIPT REQUESTED

July 11, 2002

John P. Bohenko, City Manager  
Office of City Manager  
Portsmouth City Hall  
1 Junkins Avenue  
Portsmouth, NH 03801

Re: Administrative Order No. 02-15  
NPDES Permit No. NH0100234

Dear Mr. Bohenko:

The City of Portsmouth's wastewater discharges from the Peirce Island wastewater treatment facility and untreated overflows from the combined sewer system are regulated under NPDES Permit No. NH0100234 ("Permit"). Among other requirements of the Permit, overflows from the combined sewers may not cause violations of New Hampshire water quality standards. The City, through its own discharge and receiving water monitoring, has identified combined sewer overflows as causing violations of those standards.

Enclosed is an Administrative Order issued pursuant to Section 309(a)(3) of the Clean Water Act, 33 U.S.C. §1319(a)(3). The Order requires the City to address the violations of the above mentioned Permit. Specifically, the City has violated bacterial limits for both shellfish harvesting and for swimming.

The Order requires the City to:

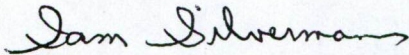
1. By August 1, 2002 submit a final Long Term Control Plan ("LTCP") for CSOs outlining the steps and schedule by which the City will come into compliance with its permit and the New Hampshire water quality standards;
2. By August 1, 2002 submit an update of the Portsmouth Nine Minimum Controls for Combined Sewer Overflows previously submitted January 14, 1997;
3. By February 28, 2003, complete the Preliminary Design Report ("Report") for the combined sewer area. The Report will identify and map each of the projects to be conducted and contain a schedule for final design and construction for each project; and
4. By March 3, 2003, advertise bids for the construction of the Area #1 Project in the vicinity of Outfalls 010A and 010B.



Violation of this Order may subject the City to further enforcement action under Section 309 of the Clean Water Act, in which injunctive relief and or penalties may be sought.

If you have any questions concerning the terms of this Order, please contact Eric Hall of the Water Technical Unit at 617-918-1880.

Sincerely,



Samuel Silverman, Acting Director  
Office of Environmental Stewardship

cc: Sharon Ducharme, NH DES  
Gretchen Rule, NH DES  
David Allen, City Engineer  
W. Steven Clifton, P.E., Underwood Engineers



UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA and  
STATE OF NEW HAMPSHIRE,

Plaintiffs,

v.

CITY OF PORTSMOUTH, NEW HAMPSHIRE,

Defendant.

OPTIONAL FORM 99 (7-90)

**FAX TRANSMITTAL**

# of pages ► 9

To <b>PETER RICE</b>	From <b>Joy HILTON</b>
Dept./Agency <b>PORTSMOUTH - PETER RICE</b>	Phone # <b>(617) 918-1877</b>
Fax # <b>(603) 427-1539</b>	Fax # <b>(617) 918-0877</b>
NSN 7540-01-317-7368	5099-101 GENERAL SERVICES ADMINISTRATION

CIVIL ACTION NO. 89-234

AMENDMENT TO CONSENT DECREE

WHEREAS, plaintiffs the United States and the State of New Hampshire ("State") and defendant the City of Portsmouth, New Hampshire ("Portsmouth" or "City"), consented to the Consent Decree entered in this action by the Court on February 4, 1991;

WHEREAS, the Consent Decree concerns, *inter alia*, the wastewater treatment plant owned and operated by Portsmouth at Peirce Island ("the wastewater treatment plant");

WHEREAS, the United States Environmental Protection Agency ("EPA") issued a permit under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") to Portsmouth in 1985 ("1985 NPDES permit") and has issued or will soon issue a new NPDES permit under the Clean Water Act to Portsmouth ("new NPDES permit");

WHEREAS, the parties have agreed that an outfall extension and diffuser for the wastewater treatment plant shall be constructed in order to facilitate the wastewater treatment plant's compliance with the Clean Water Act, 33 U.S.C. § 1301, *et seq.*;

WHEREAS, the parties agree to the provisions stated in I.-V. below;

**DRAFT**

FEB 16 2005



NOW, THEREFORE, upon the consent of the parties, it is hereby ordered, adjudged and decreed as follows:

I. The Consent Decree, entered on February 4, 1991, is amended by replacing Paragraphs 6.A., 6.B., 7 and 8, respectively, with the following Paragraphs 6.A., 6.B., 6.C., 6.D., 7, and 8:

6.A. By November 1, 2005, Portsmouth shall submit plans and specifications for the wastewater treatment plant outfall extension and multiport diffuser outfall 002 ("WWTF 002") to the New Hampshire Department of Environmental Services ("NH DES") for approval;

6.B. By January 15, 2006, Portsmouth shall advertise for bids for construction and installation of the wastewater treatment plant outfall extension and multiport diffuser outfall 002 in accordance with plans and specifications approved by the NHDES ("Plans and Specifications");

6.C. By April 1, 2006, Portsmouth shall award a contract to construct and install the wastewater treatment plant outfall extension and multiport diffuser outfall 002 in accordance with the Plans and Specifications. This outfall extension, outfall 002, shall extend outfall 001 by approximately 197 feet, and shall achieve a calculated minimum effluent dilution of 177:1.

6.D. By March 1, 2007, Portsmouth shall complete construction of the wastewater treatment plant outfall extension and multiport diffuser outfall 002 in accordance with the Plans and Specifications and attain full operation of WWTF outfall 002 in conjunction with the wastewater treatment plant.



7. Portsmouth shall, at a minimum, comply with the interim effluent limits and monitoring requirements set forth in the following table and footnotes for its wastewater treatment plant discharge from outfall 001 between the effective date of this Amendment until March 1, 2007:

Effluent Characteristic	Discharge Limitations				Monitoring Requirements	
	Minimum	Average Monthly	Average Weekly	Maximum Daily	Measurement Frequency	Sample Type
Flow	—	Report	—	Report	Continuous	Recorder
Biochemical Oxygen Demand (BOD) mg/l (lbs/day)	--	150(6005)	Report	Report	2/week	24-hour composite
Total Suspended Solids (TSS) mg/l (lbs/day)	--	95(3824)	Report	Report	2/week	24-hour composite
BOD Minimum Percent Removal	--	30	--	--	--	Calculated
TSS Minimum Percent Removal	--	30	--	--	--	Calculated
pH, Standard Units	6.0	--	--	8.0	1/Day	Grab
Fecal Coliform Bacteria <sup>a</sup> , colonies/100 ml	--	14 <sup>b</sup>	--	Report <sup>c</sup>	1/Day	Grab
Total Coliform Bacteria <sup>d</sup> , colonies/100 ml	--	Report	--	--	1/Day	Grab
Whole Effluent Toxicity <sup>e</sup>						
LC50, % effluent	Report	--	--	--	1/Quarter	24-hour composite
C-NOEC, % effluent	Report	--	--	--	1/Quarter	24-hour composite



Footnote<sup>a</sup>: Use test method 9221 C E or 9222 D (as set forth below) found in Standard Methods for the Examination of Water and Wastewater, 18th or subsequent Edition(s), as approved in 40 CFR Part 136. Method 9222 D may be used in lieu of 9221 C E after it has been demonstrated to the satisfaction of the NHDES that method 9222 D generates comparable results, as per Standard Methods.

Footnote<sup>b</sup> Report the monthly geometric mean.

Footnote<sup>c</sup> No more than 10 percent of effluent samples shall contain more than 43 fecal coliform bacteria colonies per 100 ml. Report both the maximum daily fecal coliform bacteria value, and the "percentage" of samples collected during the monitoring period that exceed 43 colonies per 100 ml.

Footnote<sup>d</sup> Monitor total coliform bacteria in the discharge until the effective date of the new NPDES permit.

Footnote<sup>e</sup> Perform the 7-day chronic (and modified acute) larval growth and survival test using *Menidia beryllina*, the chronic 1-hour fertilization test using *Arbacia punctulata*, and the 48-hour static acute survival test using *Mysidopsis bahia* in accordance with 40 C.F.R. Part 136. The toxicity tests shall be performed during the calendar quarters ending March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup> and December 31<sup>st</sup>, with the values reported by the 15<sup>th</sup> day of the month following the quarter's end.

8. On and after March 1, 2007, Portsmouth shall comply with all final effluent limits, monitoring requirements, and conditions set forth in its applicable NPDES permit. On and after February 22, 1992, Portsmouth shall not bypass its wastewater treatment plant and discharge untreated wastewater unless the bypass is explicitly permitted pursuant to 40 C.F.R. § 122.41(m) and then subject to the conditions therein.

II. The Consent Decree is also amended by striking the second to last sentence of Paragraph 11.A.c. thereof.

III. The parties agree and acknowledge that final approval by the United States and entry of this Amendment to Consent Decree is subject to the requirements of 28 C.F.R § 50.7,



which provides for notice and an opportunity for public comment. The City and the State consent to the entry of this Amendment to Consent Decree without further notice. The United States consents to the entry of this Amendment , subject to publication of notice thereof in the Federal Register, pursuant to 28 C.F.R. § 50.7 and an opportunity to consider comments thereon.

IV. The Consent Decree remains in full force and effect, as amended by the provisions set forth in I. and II. above.

V. The Assistant Attorney General of the Environment and Natural Resources Division of the Department of Justice, and the undersigned representatives for the State and the City each certifies that he/she is fully authorized to enter into the terms and conditions of this Amendment to Consent Decree and to execute and legally bind the Party he/she represents to this document.

The Court finds that this Amendment to Consent Decree is reasonable and fair and adequately protects the public interest in accordance with the Clean Water Act and applicable New Hampshire law.

Dated and entered as a judgment and order of the Court this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

---

United States District Judge



United States v. the City of Portsmouth, New Hampshire, Civil No. 89-234  
United States District Court  
District of New Hampshire  
Amendment to Consent Decree

The Parties hereby enter into this Amendment to Consent Decree Modification:

For Plaintiff UNITED STATES OF AMERICA

\_\_\_\_\_  
Thomas L. Sansonetti  
Assistant Attorney General  
Environment & Natural Resources Division  
United States Department of Justice

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Elizabeth Yu  
Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044

\_\_\_\_\_  
DATE

Thomas P. Colantuono  
United States Attorney  
District of New Hampshire

\_\_\_\_\_  
Gretchen Leah Witt  
Assistant United States Attorney  
Chief, Civil Division  
Federal Building  
55 Pleasant Street  
Concord, New Hampshire 03301-3904

\_\_\_\_\_  
DATE

**DRAFT**



For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

\_\_\_\_\_  
Thomas V. Skinner  
Acting Assistant Administrator  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Stephen S. Perkins  
Director, Office of Environmental Stewardship  
United States Environmental Protection Agency,  
Region I  
One Congress Street  
Boston, MA 02114

\_\_\_\_\_  
DATE

**DRAFT**



United States v. the City of Portsmouth, New Hampshire, Civil No. 89-234  
United States District Court  
District of New Hampshire  
Amendment to Consent Decree

For Defendant CITY OF PORTSMOUTH, NEW HAMPSHIRE

---

DATE

**DRAFT**



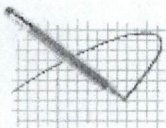
**City of Portsmouth Comments on Draft Administrative Order Docket No. 07-016**

Page 3 II Findings, Item 7 - **delete** from the first sentence reference to violation of the total residual chlorine limit. The plant is meeting the total residual chlorine limit of 0.33 mg/L. *change IRLs - delete TRC 107*

Page 5 III Order Item 1 - **Change** "Within 60 days of receipt of this Order," to "By October 19, 2007,"


With regard to the CSO Long Term Control projects, we assume that by "Court 3" we are referring to the project that impacts State Street.





Michael  
Wagner/R1/USEPA/US  
06/19/2007 01:29 PM

To Joy Hilton/R1/USEPA/US@EPA  
cc  
bcc

Subject Re: Portsmouth - draft AO and draft Executive Summary 

I think that we need to take out the reference to the waiver.

Then you can send it to Peter in draft form.

Then you can call Peter and tell him what we are doing. Before we expand the scope of the order, the City needs to see if it can work out a compromise with CLF.

Have you shared Brian's comments with Peter?



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I

IN THE MATTER OF	)	DOCKET NO. 07-016
Portsmouth, New Hampshire	)	
NPDES Permit No. NH0100234	)	FINDINGS OF VIOLATION
	)	
	)	AND
	)	
Proceedings under Section 309(a)(3)	)	ORDER FOR COMPLIANCE
of the Clean Water Act, as amended,	)	
33 U.S.C. §1319(a)(3)	)	

I. STATUTORY AUTHORITY

The following Findings are made and ORDER issued pursuant to Section 309(a)(3) of the Clean Water Act, as amended (the "Act"), 33 U.S.C. §1319(a)(3), which grants to the Administrator of the U.S. Environmental Protection Agency ("EPA") the authority to issue orders requiring persons to comply with Sections 301, 302, 306, 307, 308, 318 and 405 of the Act and any permit condition or limitation implementing any of such sections in a National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 of the Act, 33 U.S.C. §1342. This authority has been delegated to EPA Region I's Regional Administrator, and in turn to the Director of the Office of Environmental Stewardship (the "Director").

The Order herein is based on findings of violations of Section 301 of the Act, 33 U.S.C. §1311, and the conditions of NPDES Permit No. NH0100234. Pursuant to Section 309(a)(5)(A) of the Act, 33 U.S.C. §1319(a)(5)(A), the Order provides a schedule for compliance which the Director has determined to be reasonable.



## II. FINDINGS

The Director makes the following findings of fact:

1. The City of Portsmouth, New Hampshire (the "Permittee" or "City") is a municipality, as defined in Section 502(4) of the Act, 33 U.S.C. §1362(4).
2. The City is a person under Section 502(5) of the Act, 33 U.S.C §1362(5). The City is the owner and operator of a Publicly-Owned Treatment Works, which includes a wastewater treatment facility (the "WWTF") and four combined sewer overflow (CSO") outfalls from which pollutants, as defined in Section 502(6) and (12) of the Act, 33 U.S.C. §1362(6) and (12), are discharged from a point source, as defined in Section 502(14) of the Act, 33 U.S.C. § 1362(14), to the Piscataqua River and South Mill Pond. The WWTF is a 4.8 million gallons per day ("MGD") chemically-enhanced primary wastewater treatment facility that discharges an average daily flow of approximately 3.5 MGD of treated wastewater to the Piscataqua River during dry weather. South Mill Pond flows into the Piscataqua River which flows into the Atlantic Ocean. All three waterways are Class B waterways and waters of the United States as defined in 40 C.F.R. §122.2 and, therefore, are navigable waters under Section 502(7) of the Act, 33 U.S.C. §1362(7).
3. Section 301(a) of the Act, 33 U.S.C. §1311(a), makes unlawful the discharge of pollutants to waters of the United States except in compliance with, among other things, the terms and conditions of an NPDES Permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.



4. On April 10, 2007, the City was reissued NPDES Permit No. NH0100234 ("NPDES Permit") by the Director of the Office of Ecosystem Protection of EPA, Region I, under the authority of Section 402 of the Clean Water Act, 33 U.S.C. §1342. The effective date of the NPDES Permit is August 1, 2007. It will expire on July 31, 2012. The NPDES Permit supersedes the permit issued on January 18, 1985.
5. The NPDES Permit authorizes the City to discharge pollutants from a point source (Outfall No. 001) at the WWTF to the Piscataqua River and from four CSO outfalls (Outfall No. 010A, Outfall No. 010B, Outfall No. 012 and Outfall No. 013) to South Mill Pond and the Piscataqua River, subject to the effluent limitations, monitoring requirements and other conditions specified in the NPDES Permit.
6. Section I.A.1. of the NPDES Permit includes secondary treatment-based effluent limitations for discharges from Outfall No. 001. The limited parameters include five day biochemical oxygen demand ("BOD<sub>5</sub>") and total suspended solids ("TSS"), water quality criteria-based limits for total residual chlorine, and water-quality-standards-based limits for pH and fecal coliform bacteria. The NPDES Permit also includes an acute whole effluent toxicity ("WET") limitation and monitoring requirements.
7. The Permittee's discharge of BOD<sub>5</sub>, TSS, total residual chlorine, and acute WET to the Piscataqua River exceed the BOD<sub>5</sub>, TSS, total residual chlorine, and acute WET limits in the NPDES Permit.



8. Section I.F.3. of the NPDES Permit requires that residual chlorine levels prior to dechlorination be provided using a continuous recorder.
9. The permittee does not record residual chlorine with a continuous recorder.
10. Section I.C.1.a.(1) of the NPDES Permit requires that CSO discharges receive a level of treatment necessary to achieve compliance with water quality standards.
11. The Permittee discharges untreated combined sewage that contains bacteria at concentrations that cause or contribute to the exceedance state water quality standards in the receiving waters.
12. Section 301(a) of the Act, 33 U.S.C. §1311(a), makes unlawful the discharge of pollutants to waters of the United States except in compliance with, among other things, the terms and conditions of an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.
13. The Permittee's discharge of wastewater from Outfall No. 001 to the Piscataqua River in excess of the limits contained in the NPDES Permit, the failure to install and maintain a residual chlorine recorder prior to dechlorination, and the discharges of wastewater with bacteria from Outfalls 010A, 010B, 012 and 013 which caused levels of bacteria in the receiving water to exceed the State Water Quality Standards occurred in violation of the NPDES Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a).

### III. ORDER

Accordingly, it is hereby ordered that the Permittee shall:



1. Wastewater Facilities Study of both CSO and Secondary Treatment Options:

**Within 60 days of receipt of this Order**, prepare and submit to EPA and the New Hampshire Department of Environmental Services ("NHDES") a Technical Memorandum summarizing the results of the City's Tasks 1 and 2 evaluations itemized in draft Wastewater Management Plan Scope of Work submitted to EPA in May, 2007.

2. Interim Effluent Limitations:

- a. The City shall comply with the interim effluent limitations and monitoring requirements for Outfall No. 001 contained in **Attachment A** of this Order.
- b. The Permittee shall also comply with all effluent limitations, monitoring requirements and other conditions specified in the NPDES Permit for the parameters not covered in **Attachment A**. It is the Permittee's obligation to operate the treatment facilities in a manner so as to maximize removal efficiencies and effluent quality.

3. Whole Effluent Toxicity:

Within 90 days of receipt of this Order, submit to EPA and the NH DES a detailed engineering report that: (1) evaluates the specific causes of violations of the acute whole effluent toxicity limitation contained in the NPDES Permit; and (2) recommends corrective measures to eliminate these violations.



4. Combined Sewer Overflow Abatement Projects:

The City shall implement CSO abatement projects defined in its April 2005 *Final CSO Long Term Control Plan* in accordance with the following schedule:

Planning Area I.D.	Contract I.D.	Project Start Date	Project Completion Date
Lincoln	2	4/1/2007	7/1/2009
Lincoln	2A	7/1/2008	11/1/2010
Lincoln	3	4/1/2009	7/1/2011
Lincoln	3A	4/1/2010	7/1/2012
Borthwick	Interceptor	Under Design	1/1/2010
Court	Court #2	Under Construction	1/1/2009
Court	Court #3	1/1/2008	1/1/2012
Islington	Islington #1	Under Design	7/1/2009
Islington	Islington #2	7/1/2009	1/1/2012
Deer Street PS		Under Construction	7/1/2007
Mechanic Street PS		1/1/2009	4/1/2010
Revisit 2005 LTCP Flow Monitoring		1/1/2008	7/1/2008

5. Quarterly Progress and Work Projection Reports:

Beginning with the calendar quarter ending September 2007, submit quarterly reports on the City's progress in implementing the provisions of this Order. The reports shall be submitted by the last day of the month following the calendar quarter monitoring period. At a minimum, these progress reports shall include a description of: (1) activities undertaken during the reporting period directed at achieving compliance with this Order; (2) a summary of the status of all plans, reports, and other deliverables required by this Order that the City completed and submitted during the reporting period; and (3) expected activities to be completed during the next reporting period in order to achieve compliance with this Order.



#### IV. NOTIFICATION PROCEDURES

- I. Where this Order requires a specific action to be performed within a certain time frame, the Permittee shall submit a written notice of compliance or noncompliance with each deadline. Notification must be mailed within fourteen (14) days after each required deadline. The timely submission of a required report shall satisfy the requirement that a notice of compliance be submitted.
2. If noncompliance is reported, notification should include the following information:
  - a. A description of the noncompliance;
  - b. A description of any actions taken or proposed by the Permittee to comply with the lapsed schedule requirements;
  - c. A description of any factors that explain or mitigate the noncompliance; and
  - d. An approximate date by which the Permittee will perform the required action. After a notification of noncompliance has been filed, compliance with the past requirement shall be reported by submitting any required documents or providing EPA with a written report indicating that the required action has been achieved.
3. Submissions required by this Order shall be in writing and should be mailed to the following addresses:

U.S. Environmental Protection Agency  
Region I  
One Congress Street, Suite 1100 (SEW)  
Boston, MA 02114-2023  
Attn: Joy Hilton

and



New Hampshire Department of Environmental Services  
Bureau of Wastewater Engineering  
P.O. Box 95 - 29 Hazen Drive  
Concord, NH 03302-0095  
Attn: Margaret Bastien

#### V. GENERAL PROVISIONS

- I. This Order does not constitute a waiver or a modification of the terms and conditions of the NPDES Permit. The NPDES Permit remains in full force and effect. EPA reserves the right to seek any and all remedies available under Section 309 of the Act, 33 U.S.C. § 1319, as amended, for any violation cited in this Order.
2. This Order shall become effective upon receipt by the Permittee.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Susan Studlien, Director  
Office of Environmental Stewardship  
Environmental Protection Agency, Region I



**ATTACHMENT A**

**INTERIM EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS for Outfall Serial Number 001**

Effluent Characteristic	Discharge Limitations				Monitoring Requirements	
	Minimum	Average Monthly	Average Weekly	Maximum Daily	Measurement Frequency	Sample Type
Flow	--	Report	--	Report	Continuous	Recorder
Biochemical Oxygen Demand <sub>5</sub> ("BOD <sub>5</sub> ") mg/l (lbs/day)	--	150(6005)	Report	Report	2/week	24-Hour Composite
Total Suspended Solids ("TSS") mg/l (lbs/day)	--	95(3803)	Report	Report	2/week	24-hour composite
BOD <sub>5</sub> Minimum Percent Removal	--	30	--	--	1/Month	Calculated
TSS Minimum Percent Removal	--	30	--	--	1/Month	Calculated
Total Residual Chlorine, mg/l	--	1.5	--	Report	2/Day	Grab
Chlorine Usage <sup>a</sup>	--	--	--	--	Continuous	SCADA System
Whole Effluent Toxicity <sup>b</sup> , LC50, % effluent	--	--	--	Report	1/Year	24-Hour Composite
(WET Sample) Ammonia as Nitrogen, Total Recoverable Al, Cd, Cu, Pb, Ni, Zn	--	--	--	Report	1/Year	24-Hour Composite

Footnote<sup>a</sup>: Use the SCADA system to monitor the fluid level of the bulk chlorine storage tank and maintain a bound logbook with complete records of chemical use, chemical feed pumps activity, any alarms for chemical feed pump failure and leakage, chlorination system maintenance and repair, and SCADA system maintenance.

Footnote<sup>b</sup>: Beginning in 2008, the tests shall be performed during the July-September calendar quarter using *Menidia beryllina* and *Mysidopsis bahia* with results postmarked by October 15<sup>th</sup>.



	BOD				TSS				TSS		TSS	
	AVE MO	AVE MO	MAX DAY	MAX DAY	AVE MO	AVE MO	MAX DAY	MAX DAY	AVE MO	MAX DAY	AVE MO	MAX DAY
	MG/L	LB/D	MG/L	LB/D	MG/L	LB/D	MG/L	LB/D	MG/L	LB/D	MG/L	MG/L
1985 PERMIT LIMITS	150	5630			125	4691						
2007 PERMIT LIMITS	30	1201	50	2002	30	1201	50	2002	0.33	0.57		
Jan-05	82	3618	95		42.9 <del>43</del>	1980 <del>1917</del>					0.90	
Feb-05	89	3728	121.4		54.3	2676 <del>2533</del>					0.90	
Mar-05	78	4557			48	2722 <del>2631</del>					0.60	
Apr-05	79	4106			44	2789 <del>2233</del>					0.40	
May-05	70.7	4207			34.4	2314 <del>2414.5</del>					2.00	
Jun-05	97.2	4030			53.2	2307 <del>2219</del>					0.30	
Jul-05	124	3800			53	1680 <del>1636</del>					0.10	
Aug-05	135.2	4216			63.3	1848 <del>1957</del>					1.10	
Sep-05	133	3396			76	2028 <del>1934</del>					0.90	
Oct-05	82.9	4993			63.1	4157 <del>4266.8</del>					0.80	
Nov-05	73.9	3306	92.4		54.4	2778 <del>2456.7</del>					1.50	
Dec-05	89	4259	114.6		39.4	2031 <del>1850</del>					1.40	
Jan-06	72.7	3734	92.9		50.3	2712 <del>2751.7</del>					1.10	
Feb-06	85	3901	112.6		59.3	3126 <del>2844</del>					0.80	
Mar-06	90	3081	122.9		67	2274 <del>2314</del>					0.80	
Apr-06	73.5	3674	100		49.5	2062 <del>2511.6</del>					0.50	
May-06	62	4391	75.6		50 <del>49.7</del> <del>49.7</del>	3888 <del>3693</del>					0.60	
Jun-06	66.2	3538	100.1		46	3111 <del>2733.3</del>					0.60	
Jul-06	79.2	3631	116.5		49.8	2280 <del>2596.4</del>					0.20	
Aug-06	102	3719	140.3		56	2157 <del>2067</del>					0.10	
Sep-06	95	3443	115.7		50.3 <del>50</del>	1779 <del>1840</del>					0.50	
Oct-06	91	3099	122.6		41.8 <del>42</del>	1787 <del>1424</del>					0.10	
Nov-06	54	3423	90.7		42.6 <del>43</del>	2708 <del>2765</del>					0.25	
Dec-06	76	3272			55	2476					0.86	